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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001253-MR

CHRISTOPHER BECHTLER; AND
KISTER WOOD PRODUCTS, INC.

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CI-004262

FIFTH THIRD BANK, KENTUCKY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: GUDGEL, JOHNSON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Christopher Bechtler and Kister Wood Products, Inc., have appealed from a summary judgment entered by the Jefferson Circuit Court on April 2, 2001, in favor of Fifth Third Bank, Kentucky, Inc. Having concluded that there is no genuine issue as to any material fact and that Fifth Third Bank is entitled to judgment as a matter of law, we affirm.

In April 1996 Bechtler purchased Kister Wood Products, a manufacturer and installer of high-end custom wood products for

commercial and select residential construction. Bechtler sought to expand the business and as a result required an influx of capital. Bechtler received a commitment from Banakor Swisse, a Luxembourg banking concern, to loan Kister Wood Products \$4 million provided Kister Wood Products was able to acquire the services of a bank acceptable to Banakor Swisse to act as an escrow agent.

On February 12, 1998, William Otten, Vice President of Fifth Third Bank, wrote Bechtler a letter indicating that Fifth Third Bank was willing to establish an escrow account for Bechtler's transactions with Kister Wood. The letter reads as follows:

Dear Chris,

This letter is to confirm that Fifth Third Bank will set up an escrow account for your transactions involving Kister.

Please call me with any questions.

Sincerely,

/s William J. Otten
Vice President

On July 17, 1998, Otten wrote Bechtler a much more detailed follow-up letter. In this letter, Otten specifically stated that Fifth Third Bank would not set up an escrow account that would be governed by the laws of Switzerland. Otten described the governing law requirement as a "threshold issue." Otten stated that Fifth Third Bank would be willing to provide

routine escrow services, but it would not agree to be governed by Switzerland law.

On July 22, 1999, Bechtler and Kister Wood Products filed a complaint against Fifth Third Bank. On September 1, 1999, Fifth Third Bank moved the trial court to dismiss the complaint. On October 6, 1999, the trial court granted Fifth Third Bank's motion and dismissed the complaint. On December 30, 1999, the trial court vacated the order of dismissal based upon Bechtler and Kister Wood Product's motion pursuant to CR¹ 60.02. On March 1, 2000, Bechtler and Kister Wood Products filed their "First Amended Complaint." On April 7, 2000, Fifth Third Bank moved the trial court to dismiss the amended complaint pursuant to CR 12.05.

On June 7, 2000, Fifth Third Bank moved the trial court to enter an order suspending discovery pending its decision on the motion to dismiss. The trial court ordered that the parties would have until July 5, 2000, to complete already propounded discovery. On April 2, 2001, the trial court entered an opinion and order granting summary judgment to Fifth Third Bank. On April 12, 2001, Bechtler and Kister Wood moved the trial court to alter, amend or vacate the summary judgment. On May 16, 2001, the trial court denied Bechtler and Kister Wood Product's motion. This appeal followed.

¹Kentucky Rules of Civil Procedure.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."² In Paintsville Hospital Co. v. Rose,³ the Supreme Court of Kentucky held that for summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."⁴ The standard of review on appeal of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue.⁵ "The record must be viewed in a light most favorable to the party opposing the motion

²CR 56.03.

³Ky., 683 S.W.2d 255 (1985).

⁴Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

⁵Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

for summary judgment and all doubts are to be resolved in his favor."⁶

Bechtler and Kister Wood Products argue that the trial court erred in granting summary judgment in favor of Fifth Third Bank because the trial court improperly substituted its judgment for the trier of fact and determined that there was a "lack of intent" of the parties to be bound in a contractual relationship. The appellants also claim that the trial court prematurely granted summary judgment before they had an opportunity to depose certain employees of Fifth Third Bank. However, we believe the appellants have failed to address the fundamental finding of the trial court--that the letter written from Otten to Bechtler failed to satisfy the Statute of Frauds.

In its opinion the trial court in reference to the Statute of Frauds issue stated as follows:

William S. Haynes, Kentucky Jurisprudence-Contracts, 1986 asked the question presented herein: "What is sufficient note or memorandum which will satisfy the Statute of Frauds?" At 209. He wrote that, ". . . it is necessary to emphasize that a considerable difference exists between a written contract and a written memorandum of an oral contract. In the case of a written contract, parol evidence cannot be admitted to impeach a clear provision whereas, in the case of a memorandum or note of an oral contract parol evidence may be admitted for the purpose of clarifying either the validity, existence, or terms of a prior oral agreement." At 209. The author recognizes that K.R.S. 371.010, ". . . is harmonious with the Restatement

⁶Steelvest, supra at 480.

(Second) of Contracts in requiring that the writing (a) must be signed by the party sought to be charged; (b) that it must reasonably identify the subject matter; (c) that it must evidence that a contract has been made; and (d) that it must set forth the essential terms." At 210. The writing submitted herein is in fact, signed by Mr. Otten as a representative of Fifth Third. It references an escrow account. However, that document contains no references to the terms of any agreement, nor does it allude to the transaction involving Banakor Swisse. While Section 132 of the Restatement (Second) of Contracts (1979) states that multiple documents may be used to satisfy the Statute of Frauds, those writings must ". . . clearly indicate that they relate to the same transaction." However, ". . . letters and correspondence, which may be classified as preliminary negotiations, may not constitute a written memorandum, absent an intent of the parties to be bound thereby." At 213. Under the circumstances presented herein, this Court cannot find that the document is sufficient to take the purported agreement out of the Statute of Frauds.

KRS⁷ 371.010(9) is the governing provision of the Statute of Frauds in the case sub judice. It states:

No action shall be brought to charge any person:

. . .

- (9) Upon any promise, contract, agreement, undertaking, or commitment to loan money, to grant, extend, or renew credit, or make any financial accommodation to establish or assist a business enterprise or an existing business enterprise including, but not limited to the purchase of realty or real property, but this

⁷Kentucky Revised Statutes.

subsection shall not apply to agreements pursuant to which credit is extended by means of a credit card or similar device or to consumer credit transactions[.]

The trial court agreed with Fifth Third Bank's argument that the February 12, 1998, letter written by Otten to Bechtler does not satisfy this provision of the Statute of Frauds. The appellants contend that the trial court erred by limiting its examination of the record to the letter from Otten to Bechtler and by not taking into account admissible parol evidence. The appellants state that "Fifth-Third took several positive steps that indicated their knowledge of such obligations." We have reviewed the record in a light most favorable to the appellants and have found that the record would not support a finding that Fifth Third Bank had agreed to all of the essential terms of the agreement.

In Clinkinbeard v. Poole,⁸ the former Court of Appeals stated:

It seems well established in all jurisdictions that a writing or memorandum sufficient to satisfy the requirements of the statute of frauds must be complete in itself as to the parties charged with liability thereunder and the essential terms of the contract. 49 Am.Jur., Section 322, Page 636, Statute of Frauds; Gibson v. Crawford, 247 Ky. 228, 56 S.W.2d 985; Purcell v. Campbell, 261 Ky. 644, 88 S.W.2d 670. Minor details may in some instance be shown by parol, but

⁸Ky., 266 S.W.2d 796, 798 (1954). See also Walker v. Keith, Ky., 382 S.W.2d 198, 203 (1964). "The purpose of requiring a writing to evidence an agreement is to assure certainty of the essential terms thereof and to avoid controversy and litigation."

we have nowhere found any authority for supplying the material and essential features of an agreement based upon a writing which does nothing more than furnish some evidence of the existence of a prior parol agreement.

The letter dated February 12, 1998, simply did not contain the essential terms of the contract and thus failed to satisfy the requirements of the Statute of Frauds. The letter merely stated "that Fifth Third Bank will set up an escrow account for [Bechtler's] transactions involving Kister" Wood Products. The letter does not mention the Banakor Swisse transaction or any of the essential terms of that contract such as Fifth Third Bank's willingness to be governed by the laws of Switzerland.

The appellants have also argued that the trial court prematurely dismissed their case by summary judgment because discovery which was necessary in their development of parol evidence had not taken place. However, the case law is clear that parol evidence is not admissible to supply essential terms of a contract. As stated in Clinkinbeard, in some cases "minor" details of a contract may be supplied by parol evidence. In the case sub judice, the letter that the appellants are relying on to show Fifth Third Bank's intent to be bound would require parol evidence to supply the essential terms of the contract.

The trial court was correct in its determination that the record did not contain sufficient facts that would make it possible for the appellants to prevail at trial. The evidence that appellants claim that they were prevented from obtaining due

to the trial court's premature granting of summary judgment would have been inadmissible parol evidence. Thus, we hold that the letter from Otten to Bechtler failed to satisfy the requirements of the Statute of Frauds and that parol evidence is not admissible to supply the missing essential elements.

Bechtler also argues that the trial court erred as matter of law in applying a one-year statute of limitations to his "emotional damages" claim. Bechtler argues that he asserted damages based upon Fifth Third Banks' outrageous conduct in intentionally interfering with his contract rights. In his brief, Bechtler states:

The trial court incorrectly applied KRS 413.140 to Mr. Bechtler's claims for emotional distress, which imposed a one-year statute of limitations that barred said claims. Mr. Bechtler's claims were properly governed by KRS 413.120(6), which provides for a five-year statute of limitations. The trial court erred as a matter of law in applying the wrong statute, and Appellants are entitled to a reversal of the trial court's summary judgment of Mr. Bechtler's emotional damage claims as a matter of law.

Bechtler has failed to identify where in his complaint he alleged an injury due to the outrageous conduct of Fifth Third Bank. In Bechtler's original complaint filed on July 22, 1999, paragraph 21 states:

The acts of Fifth Third described above, represent wilful misrepresentation, and, as a direct and proximate result thereof, the Plaintiff, Bechtler, suffered, and will continue to suffer, physical and mental pain and anguish entitling him to monetary damages in an amount in excess of the jurisdictional requirement of this Court.

Bechtler failed to make any additional allegations in the amended complaint which would support a claim of intentional infliction of mental distress. While Bechtler's complaints can be read broadly enough to include the allegation that Fifth Third Bank's intentional or reckless conduct caused Bechtler to suffer emotional distress, there was no allegation to support the required elements that Fifth Third Bank's conduct was "intolerable in that it offends against the generally accepted standards of decency and morality[,]" and that the emotional distress suffered by Bechtler was "severe."⁹

In Hoke v. Cullinan,¹⁰ the Supreme Court of Kentucky stated:

Despite the informality with which pleadings are nowadays treated, and despite the freedom with which pleadings may be amended, CR 15.01, the central purpose of pleadings remains notice of claims and defenses. Lee v. Stamper, Ky., 300 S.W.2d 251 (1957); see also Morgan v. O'Neil, Ky., 652 S.W.2d 83 (1983).

Thus, since Bechtler has failed to sufficiently plead a claim of intentional infliction of mental distress arising from Fifth Third Bank's conduct, the trial court correctly applied the one-year statute of limitations pursuant to KRS 413.140(1)(a), and not the five-year statute of limitations contained in KRS 413.120(6).

⁹Kroger v. Willgruber, Ky., 920 S.W.2d 61, 65 (1996).

¹⁰Ky., 914 S.W.2d 335, 339 (1995).

Finally, we dispose of the appellants' argument that the trial court erred as a matter of law in its application of KRE¹¹ 301 regarding evidentiary presumptions by agreeing with Fifth Third Bank that the rule is not applicable to this case.

For the foregoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Laurence J. Zielke
Benjamin S. Schechter
John T. Byrd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas Gene Sharp
Louisville, Kentucky

¹¹Kentucky Rules of Evidence.